

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

DANTE B. MAGDALUYO, JR.,

Plaintiff,

vs.

MGM GRAND HOTEL, LLC, et al.,

Defendants.

Case No. 2:14-cv-01806-RFB-GWF

**ORDER**

**Motion to Compel (#87) and  
Motion for Sanctions (#88)**

This matter is before the Court on Plaintiff's Motion to Compel (#87) and for Sanctions (#87), filed on January 5, 2016. Defendant filed its Opposition (#91) on January 22, 2016, and Plaintiff filed his Reply (#92) on February 1, 2016. The Court conducted a hearing in this matter on February 8, 2016.

**BACKGROUND**

Plaintiff Dante Magdaluyo, Jr., who represents himself in this action, is employed as a dealer at Defendant MGM Grand Hotel casino. Plaintiff alleges in his one page complaint that he has been the victim of a conspiracy by his superiors and co-workers to subject him to a course of discrimination, harassment, retaliation and defamation. *See Complaint (#5)*. Defendant has filed a motion to dismiss for failure to state a claim which remains pending before the Court.

On or about November 28, 2013 Plaintiff left his backpack in the dealer's quiet room. Without Plaintiff's permission, another employee moved his backpack from the quiet room to the outer main dealer's room. Plaintiff was able to review the video recording in the quiet room which showed the employee moving his backpack out of the room. Plaintiff completed a Voluntary Statement on November 28, 2013 which he submitted to MGM's security department and in which

1 he requested that video surveillance recording in the quiet room be preserved. *Motion* (#87),  
2 *Exhibit 1*, pg. 1. He also demanded the opportunity to view the video surveillance recording for the  
3 “main dealer’s room” so that he could determine whether someone searched his backpack as he  
4 suspected. *Id.*, pg. 2. Plaintiff also sent a letter to MGM’s human resources office on November  
5 28, 2013 in which he requested that the video recordings be preserved. *Exhibit 2*, pg. 1. Defendant  
6 states that the employee moved Plaintiff’s backpack out of the quiet room because a cell phone  
7 inside the backpack was ringing. *Opposition* (#91), pg. 4. Defendant provided Plaintiff with the  
8 surveillance video of the quiet room, but apparently did not preserve the surveillance video  
9 recording from the main dealer’s room as Plaintiff had demanded.

10 On December 11, 2013, Plaintiff sent an email to Defendant’s human resources employee  
11 complaining of an incident that occurred on that date. According to Plaintiff’s email, as he was  
12 walking by a gaming pit, a supervisor looked at him “and pretended to come out of the pit to  
13 approach me with the intention to harass and intimidate me. I ignored him.” *Motion* (#87), *Exhibit*  
14 4. Another employee gave Plaintiff a very angry look as Plaintiff passed by him. Plaintiff states  
15 that a third employee observed what occurred. Although Plaintiff did not specifically request that  
16 surveillance videos of this incident be preserved or provided to him, he informed the human  
17 resources employee that he was being harassed and that he intended to file a case with the EEOC if  
18 she could not help him. Plaintiff alleges that his email was sufficient to place Defendant on notice  
19 of the relevance of any surveillance video recording of the incident and required it to take steps to  
20 preserve the recording.

21 Plaintiff also submitted exhibits to the Court during the hearing on February 8, 2016. Most  
22 of these exhibits are the same as those attached to his motion. Hearing Exhibit No. 7 includes a  
23 copy of the complaint that Plaintiff filed with the EEOC on March 31, 2014. This complaint  
24 identifies Patricia Bush as MGM’s Human Resources Director. Hearing Exhibit 8 purports to be a  
25 letter that Plaintiff wrote to Patricia Bush on January 6, 2014 in which he references incidents on (1)  
26 January 5 to January 6, 2014 in which employees from the cashier’s cage stared at him and  
27 attempted to intimidate him; (2) January 6, 2014 in which floor supervisors watched him in a  
28 harassing manner; and (3) January 1, 2014 in which a supervisor stared at him in an angry manner.

1 Exhibit 8 was not attached to Plaintiff's motion or reply brief.<sup>1</sup>

2 Plaintiff subsequently served two sets of requests for production of documents on Defendant  
3 in which he requested surveillance video recordings that potentially captured a number of incidents  
4 in which he was allegedly harassed, intimidated, assaulted or battered by supervisors or coworkers.  
5 *Motion (#87), Exhibits 8 and 10.* Plaintiff also attached copies of Defendant's responses to the  
6 requests for production. *Exhibits 9 and 11.* It is not clear on what dates Plaintiff actually served his  
7 requests for production because he did not date them or attach a certificate of service showing when  
8 they were served on Defendant. He attached a certificate of service to his reply brief, however,  
9 which states that he served his first set of requests for production on August 4, 2015. Defendant  
10 served its responses to Plaintiff's first set of requests for production on September 8, 2015. *Exhibit*  
11 *9, pg. 19.* Defendant served its responses to Plaintiff's second set of requests for production on  
12 October 19, 2015. *Exhibit 11, pg. 18.* Defendant's counsel represented that they received Plaintiff's  
13 requests for production approximately 30 days before they served their responses.

14 Plaintiff's First Set of Requests for Production requested video recordings depicting the  
15 incidents on November 28, 2013 and December 11, 2013. *Exhibit 8, Request Nos. 17 and 20.* It  
16 also requested video recordings depicting the incidents on January 1, 2014 (Request No. 21); and  
17 January 21, 2014 (Request No. 18). *Exhibits 8 and 9.*

18 Plaintiff's Second Set of Requests for Production requested video recordings depicting the  
19 incidents on February 25, 2014 (Request No. 9); May 31, 2014 (Request No. 11); July 6, 2014  
20 (Request No. 13); July 15, 2014 (Request No. 23); September 3, 2014 (Request No. 15); November  
21 2, 2014 (Request No. 22); November 9, 2014 (Request No. 21); November 17, 2014 (Request No.  
22 24); November 23, 2014 (Request No. 25); December 2, 2014 (Request No. 16); December 9, 2014  
23 (Request No. 17); January 25, 2015 (Request No. 4); March 11, 2015 (Request No. 2); and August  
24 23, 2015 (Request No. 1). *Exhibits 10 and 11.*

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26  
27 <sup>1</sup> Plaintiff has not moved to compel production of video surveillance regarding the incidents that  
28 allegedly occurred on January 5 or 6, 2014. He has moved to compel production of the video relating to the  
alleged incident on January 1, 2014. *Exhibit 8, Request No. 21.*

1 Defendant objected to Plaintiff's requests for the video recordings on the grounds that they  
 2 are unduly burdensome and not reasonably calculated to lead to the discovery of admissible  
 3 evidence and that they are vague and ambiguous. Defendant further stated:

4 Subject to the foregoing general and specific objections, Defendant  
 5 does not have surveillance tapes responsive to this request. Defendant  
 6 retains surveillance tapes in accordance with Nevada Gaming  
 Commission standards and the time frame for which Plaintiff seeks is  
 outside the required retention period.

7 See, *Exhibit 9*, Defendant's Response to Request No. 20 and *Exhibit 11*, Defendant's  
 8 Response to Request No. 1.

9 In its opposition to Plaintiff's motion, Defendant reiterated that it retains surveillance tapes  
 10 in accordance with Nevada Gaming Commission standards which requires that surveillance video  
 11 recordings be retained for seven days. Defendant states that "there was no reason to retain any  
 12 surveillance depicting alleged approaches or glares, as these alleged 'incidents' were not brought to  
 13 MGM's attention." *Opposition (#91)*, pgs. 2-3.

14 Defendant attached a copy of the Nevada Gaming Commission's Surveillance Standards for  
 15 Nonrestricted Licensees. *Opposition (#91)*, *Exhibit 7*.<sup>2</sup> These standards define the type of  
 16 surveillance cameras that licensees must maintain and the gaming areas that must be covered and  
 17 recorded. Standard 9.1 states:

18 All video recordings of coverage provided by the dedicated cameras  
 19 or motion-activated dedicated cameras required by these standards  
 20 must be retained for a minimum of 7 days, except for recordings of  
 21 detentions and questioning by security personnel, which must be  
 retained for a minimum of thirty (30) days. All other recordings must  
 be retained a minimum of 3 days.

22 *Opposition (#91)*, *Exhibit 7*.

23 Plaintiff argues that Defendant should be required to produce the video recordings identified  
 24 in his requests for production of documents; and if Defendant fails produce the recordings, it should  
 25 be sanctioned for its failure to preserve relevant evidence. Plaintiff argues that he will be prejudiced  
 26 by Defendant's failure to produce the recordings because he does not have independent witnesses

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27  
 28 <sup>2</sup> Plaintiff submitted a copy of these standards as a hearing exhibit. *Plaintiff's Hearing Exhibit 11*.

1 who are willing to support his description of the incidents and he needs the recordings to prove the  
2 incidents occurred, and to refute Defendant's allegations that he is mentally ill or delusional.

3 *Motion* (#87), pg. 6.

#### 4 DISCUSSION

5 A party has a duty to preserve documents or things in its possession, custody or control if it  
6 has some notice that the documents or things are potentially relevant to existing or reasonably  
7 anticipated litigation. *Leon v. IDX Systems Corp.*, 464 F.3d 951, 959 (9th Cir. 2006); *U.S. v. Kitsap*  
8 *Physicians Service*, 314 F.3d 995, 1001 (9th Cir. 2002); and *Akiona v. United States*, 938 F.2d 158,  
9 161 (9th Cir. 1991). *Pettit v. Smith*, 45 F.Supp.3d 1099, 1105 (D.Ariz. 2014) notes that the duty to  
10 preserve is triggered not only when litigation actually commences, but extends to the period before  
11 litigation when a party should reasonably know that evidence may be relevant to anticipated  
12 litigation. In *Pettit*, the court held that prison officials had a duty to preserve a video recording of a  
13 use of force incident between the plaintiff-inmate and a guard. *See also LaJocies v. City of North*  
14 *Las Vegas*, 2011 WL 1630331 (D.Nev. April 28, 2011) (police had duty to preserve video recording  
15 of altercation in jail). Similarly, in *Peschel v. City of Missoula*, 664 F.Supp.2d 1137, 1143-44  
16 (D.Mont. 2009), the court held that the city had a duty to preserve police videos of plaintiff's arrest  
17 for the subsequent criminal proceedings and had a further continuing duty to preserve the video  
18 recording once it was reasonably foreseeable that civil litigation would ensue.

19 Under the Nevada Gaming Commission standards, Defendant is obligated to retain video  
20 recordings of regulated areas for a minimum of seven days and to retain videos depicting detention  
21 and questioning of individuals by security personnel for a period of thirty days. There is no  
22 evidence that any of the incidents alleged by Plaintiff involved the detention or questioning of  
23 individuals by security personnel. Except for the incidents on November 28, 2013, December 11,  
24 2013 and January 1, 2014, there is no evidence that Plaintiff placed Defendant on notice of the  
25 alleged incidents within seven days after they occurred. Plaintiff argues, however, that Defendant  
26 was required to preserve all of the requested video surveillance recordings after he notified  
27 Defendant that he was being harassed by supervisors and coworkers. In the absence of timely  
28 notification of a specific incident, however, Defendant did not have a duty to preserve video

1 recordings of the areas in which Plaintiff was working or where he might travel. Defendant  
2 represents that by the time it received Plaintiff's first and second requests for production, the seven  
3 day retention period had long expired and it no longer had video recordings of the alleged incidents  
4 (assuming that they would have been captured by surveillance cameras). Defendant cannot be  
5 compelled to produce documents or things that it does not have or which are not in its control.  
6 There is also no basis to sanction Defendant for failing to preserve video recordings when it was  
7 not notified of the alleged incidents within sufficient time to preserve the video recordings.

8         Some of the incidents for which Plaintiff seeks video recordings involved alleged assaults or  
9 batteries. *See* Request No. 9 (Second Set), February 25, 2014, assistant shift boss allegedly  
10 assaulted Plaintiff; Request No. 11 (Second Set), May 31, 2014, security officer allegedly assaulted  
11 Plaintiff; and Request No. 25 (Second Set), November 23, 2014, coworker allegedly "angrily  
12 punches his hand on [Plaintiff's] right ear." Plaintiff prepared detailed written reports on November  
13 28, 2013 regarding the removal of his backpack from the dealer's quiet room and his suspicion that  
14 it was searched in the main dealer's room. *Motion (#87), Exhibits 1 and 2*. He also sent an email to  
15 a human resources employee on December 11, 2013 complaining that a coworker approached him  
16 with the intention to harass and intimidate him, and that another worker gave him an angry look.  
17 *Id., Exhibit 4*. He also allegedly sent a written statement to Defendant's Human Resources Director  
18 on January 6, 2014 regarding recent incidents in which employees stared at him in an intimidating  
19 manner, watched him, or gave him an angry stare. *Hearing Exhibit 8*. Plaintiff has not explained  
20 why he did not promptly report in writing similar incidents that occurred thereafter and, in  
21 particular, did not promptly document and report alleged assaults or batteries by supervisors or  
22 coworkers. The lack of contemporaneous complaints or reports of these incidents casts doubt on  
23 whether they occurred.

24         This leaves for resolution, the three incidents that Plaintiff reported or allegedly reported to  
25 Defendant within seven days of when the incidents allegedly occurred. Plaintiff clearly placed  
26 Defendant on notice that the video surveillance recording in the main dealer's room on November  
27 28, 2013 should be preserved based on his suspicion that another employee may have searched his  
28 backpack. Defendant has not disputed that a surveillance camera covered the area and would have

1 shown whether anyone searched Plaintiff's backpack. Defendant also has not disputed that Plaintiff  
2 notified it on December 11, 2013 of the alleged incident that occurred on that date. Although  
3 Plaintiff did not specifically request that surveillance video of the incident be preserved, Defendant  
4 reasonably had a duty to investigate Plaintiff's allegation and to preserve any available video as part  
5 of that investigation. Defendant has not presented any information to refute the assertion that  
6 surveillance cameras would have captured some of the alleged incident if it occurred. Plaintiff did  
7 not produce his January 6, 2014 letter to Patricia Bush as an exhibit to his motion or reply brief.  
8 Defendant had no opportunity to address whether it received that communication. Therefore, the  
9 Court will not consider imposition of sanctions relating to Defendant's alleged failure to preserve  
10 and produce surveillance video of the January 1, 2014 incident.

11 In *Leon v. IDX Systems Corp.*, 464 F.3d at 959, the court stated that the relevance of  
12 destroyed evidence cannot be clearly ascertained because the evidence no longer exists. The party  
13 responsible for the destruction of the evidence, therefore, "can hardly assert any presumption of  
14 irrelevance as to the destroyed documents." *Id.* Where potentially relevant evidence is lost or  
15 destroyed prior to the commencement of litigation or the service of a discovery request under the  
16 Federal Rules of Civil Procedure, the court may sanction the party responsible for the destruction of  
17 the evidence pursuant to its inherent authority. *LaJocies v. City of North Las Vegas*, 2011 WL  
18 1630331, at \*2, citing *Leon*, 464 F.3d at 958. The court may impose a range of sanctions for  
19 spoliation of evidence depending on the culpability of the party responsible for its destruction and  
20 the prejudice caused to the opposing party. Such sanctions may include the giving of an adverse  
21 inference jury instruction, precluding the party from introducing evidence at trial, or in the most  
22 severe case granting the sanction of dismissal or default. *LaJocies* further states:

23 [A] finding of bad faith is not a prerequisite for an adverse inference.  
24 *Glover*, 6 F.3d at 1329. However, although a party's destruction of  
25 evidence need not be in bad faith in order for the court to impose  
26 sanctions, the party's motive or degree of willfulness or fault is  
27 relevant to the severity of the sanction to be imposed. *Advantacare*  
28 *Health Partners, supra*, citing *Glover v. BIC Corp.*, 6 F.3d 1318,  
1329 (9th Cir. 1993); *Akiona v. United States*, 938 F.2d 158, 161 (9th  
Cir. 1991), *cert. denied* 503 U.S. 962, 112 S.Ct. 1567, 118 L.Ed.2d  
212 (1992); *Baliotis v. McNeil*, 870 F.Supp. 1285, 1291 (M.D.Pa.  
1994). Generally, the court should choose the least onerous sanction  
corresponding to the willfulness of the destructive act and the



1 prejudice suffered by the victim. *Id.* A district court's adverse  
2 inference sanction should be carefully fashioned to deny the  
3 wrongdoer the fruits of its misconduct yet not interfere with that  
party's right to produce other relevant evidence. *In re Oracle Corp.*  
*Securities Litigation*, 627 F.3d 376, 386–87 (9th Cir. 2010).

4 2011 WL 1630331, at \*4.

5 In this case, Defendant has not provided any explanation as to why it did not preserve the  
6 surveillance video of the main dealer's room on November 28, 2013 pursuant to Plaintiff's timely  
7 request. The Court must therefore conclude that Defendant simply ignored Plaintiff's request that  
8 the video be preserved. An adverse jury instruction should be given that the video recording of that  
9 incident, if produced, would be favorable to the Plaintiff's allegation that someone searched his  
10 backpack. Plaintiff did not specifically request Defendant to preserve surveillance video of the  
11 December 11, 2013 incident, although Defendant had a duty to investigate and should have  
12 preserved video of the incident if it existed. With respect to this incident, the instruction given by  
13 the court in *Pettit v. Smith*, 45 F.Supp.3d at 1114 is appropriate. The jurors should be instructed that  
14 Defendant had a duty to preserve the video if it existed and that they may, but are not required to,  
15 infer that the video recording would have been favorable to the Plaintiff. Accordingly,

16 **IT IS HEREBY ORDERED** that Plaintiff's Motion to Compel (#87) and for Sanctions  
17 (#88) are **granted**, in part, and **denied**, in part, as follows:

18 1. The jury should be instructed that the video recording of the incident on November  
19 28, 2013, if produced, would be favorable to the Plaintiff's allegation that someone searched his  
20 backpack.

21 2. The jury should be instructed that Defendant had a duty to preserve the surveillance  
22 video of the incident on December 11, 2013 and that they may, but are not required to, infer that the  
23 surveillance video would have been favorable to the Plaintiff.

24 3. Plaintiff's motion is otherwise denied.

25 DATED this 16th day of February, 2016.

26  
27   
28 GEORGE FOLEY, JR.  
United States Magistrate Judge